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Voluntary Peer Review of Competition Law and Policy:

Namibia

Overview

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Note

Voluntary peer reviews of competition law and policy carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices, adopted by the General Assembly in 1980. The Set seeks, among other things, to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I/CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

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I. Historical, political and economic context

1. Namibia is a vast, sparsely populated country situated along the south Atlantic coast of Africa. It shares land borders with Angola and Zambia to the north, Botswana to the east, and South Africa to the south. With a total area of 825,418 km^2, Namibia is the world's thirty-fourth largest country.

2. Namibia, which officially became independent from South Africa on 21 March 1990, is a member of various regional and international groupings. Among these, notably, are the United Nations, African Union, Commonwealth of Nations, Southern African Development Community, Southern African Customs Union, Common Monetary Area, World Trade Organization, World Intellectual Property Organization (WIPO) and the African Regional Intellectual Property Organization (ARIPO).

3. Since independence, the Government of Namibia has pursued free-market economic principles to promote commercial development and job creation to bring disadvantaged Namibians into the economic mainstream. To facilitate this goal, the Government has actively courted foreign investment. The liberal Foreign Investment Act of 1990 provides guarantees against nationalization, freedom to remit capital and profits, currency convertibility and a process for settling disputes equitably. Namibia is classified as an upper middle-income country by the World Bank and ranks eighty-seventh in terms of ease of doing business.

4. The largest economic sectors of Namibia are mining, agriculture, manufacturing and tourism. Mining is the most important contributor to the economy, providing about 25 per cent of the country's revenue. Namibia is the fourth largest African exporter of non-fuel minerals and the world's fourth largest uranium producer. Rich alluvial diamond deposits make Namibia a primary source of gem-quality diamonds. Other minerals extracted industrially include lead, tungsten, gold, tin, fluorspar, manganese, marble, copper and zinc.

5. The economy of Namibia is closely tied to that of South Africa due to their shared history. Nearly 70 per cent of the imports of Namibia originate in South Africa, and approximately one third of Namibian exports go to the South African market. Namibia is seeking to diversify its trading relationship away from its dependence on South Africa. Accordingly, Europe has become a leading market for Namibian fish and meat, while Namibian mining concerns have purchased heavy equipment and machinery from Canada, Germany, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Government of Namibia is making efforts to take advantage of the United States African Growth and Opportunity Act, which provides preferential access to American markets for many products.

6. The currency of Namibia is the Namibia dollar (N$), which was introduced in September 1993, and is fixed at parity with the South African rand (R) under the Common Monetary Area.

7. Competition law was enacted in Namibia under the Competition Act of 2003. The enactment of the law preceded the formulation and adoption of a comprehensive national competition policy for the country, a process that was ongoing by the time of the fact-finding visit to Namibia in November 2013.

8. Adoption of competition law by Namibia became imperative because of the country's closeness with South Africa, whose companies have many subsidiaries in Namibia and are engaged in various anti-competitive practices. Competition issues in Namibia had been regulated by the Regulation of Monopolistic Conditions Amendment Act

(1958) of South Africa, which was however not applied in Namibia after independence. Over time, the Government of independent Namibia recognized the urgent necessity for a competition law and commissioned a study, with the assistance of the European Union, which drafted a competition bill in 1996.

9. The Competition Act, 2003, of Namibia was signed into law by the President on 3 April 2003. The enforcement agency, the Namibian Competition Commission (NaCC), only came into operation in December 2008 with the appointment, by the Minister of Trade and Industry, of its first Board of Commissioners. The Secretary to the Commission was appointed by the Board of Commissioners as Chief Executive Officer of the Commission under the terms of section 13(1) of the Act on 1 September 2009.

II. Substantive content of Namibia's competition law

10. The Competition Act, 2003, is a general law of general application in line with international best practice. The preamble to the Act states its primary objectives as being "to safeguard and promote competition in the Namibian market; to establish the Namibian Competition Commission and make provision for its powers, duties and functions; and to provide for incidental matters".

11. The Act is arranged in 9 chapters dealing with: (a) preliminary provisions (chapter 1); (b) the NaCC (chapter 2); (c) restrictive business practices (chapter 3); (d) mergers (chapter 4); (e) jurisdiction of court (chapter 5); (f) general provisions (chapter 6); (g) offences and penalties (chapter 7); (h) application of the Act and other legislation relating to competition (chapter 8); and (i) transitional provisions (chapter 9).

A. Preliminary provisions

12. The Act's preliminary provisions cover the main definitions used, the purpose of the Act, and the application of the Act. The main definitional section 1 of the Act contains 21 definitions, a number of which concern common competition terms, such as "agreement" and "concerted practice". Other terms that are relevant to competition law enforcement in Namibia, such as "confidential information" and "historically disadvantaged persons", are also defined. The term "undertaking" is defined in the Act in line with definitions in other competition legislations in the Southern African Development Community region. The definition however seems to be causing enforcement problems for the Namibian competition authority in that it excludes some market players who can affect competition in the relevant markets, as does the definition of the term "goods", which seems to exclude commercial trading in certain agricultural goods from the application of the Act.

13. Some other common competition terms that have relevance to the enforcement of competition law in Namibia are however not defined in the Act. These include terms such as "relevant market", "dominant position", "negative clearance", "essential facility" and "statutory monopoly".

14. The purpose of the Act, outlined under its section 2, is to enhance the promotion and safeguarding of competition in Namibia. While some stated objectives of that purpose are efficiency and competition related, others relate to the achievement of different socioeconomic benefits of public interest.

15. Section 3 provides that the Act generally applies to all economic activity within Namibia or having an effect in Namibia, and also that the Act binds the State in so far as it engages in commercial activities. It is further provided that the Act applies to the activities

of statutory bodies, with the exception of those activities that are specifically authorized by law.

B. Namibian Competition Commission

16. The establishment of the NaCC as an independent juristic person, that is subject only to the Constitution of Namibia and the law, is provided for by section 4 of the Act. The Commission has jurisdiction throughout Namibia and is required to be impartial and to perform its functions without fear, favour or prejudice.

17. The NaCC has the responsibility of administering and enforcing the Act, and the statutory functions of investigating and remedying anti-competitive practices, inclusive of restrictive business practices and anti-competitive mergers, and of opening up markets. It also has the functions of advocacy, education and awareness, as well as of cooperating, and exchanging information with other competition authorities, and of advising the Government on matters of public interest and sector regulation concerning competition matters.

18. The NaCC also has statutory powers, under section 22 of the Act, of making rules related to its administration, organization and operations, including prescribing forms of applications, notices, certificates and other documents required for the purposes of the Act, as well as fees to be paid for the purposes of the Act. These powers must be exercised with ministerial approval.

C. Restrictive business practices

19. Chapter 3 of the Act, on restrictive business practices, is divided as follows: (a) part I, on restrictive agreements, practices and decisions; (b) part II, on abuse of a dominant position; (c) part III, on the exemption of certain restrictive practices; and (d) part IV, on investigation into prohibited practices.

20. Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part thereof, are prohibited under the terms of section 23(1).

21. The stated objects or effects of prohibited agreements include those related to the hard-core cartel activities of price-fixing, market-sharing and bid-rigging, as well as production limitation. They also include relatively softer vertical restraint practices and conduct, such as discriminatory trading, conditional and tied selling, and resale price maintenance.

22. There is no clear distinction, under section 23, between the treatment of horizontal and vertical agreements, whose harmful effects to competition are not equal, and between those horizontal agreements that constitute hard-core cartel conduct, which should be per se prohibited, and those having some efficiency and/or pro-competitive elements, which should be considered using a "rule of reason" approach. This can present serious enforcement problems for the NaCC.

23. Abuse of a dominant position in a market is prohibited under section 26. Practices that constitute abuse of a dominant position in terms of the Act are of both an exploitative and exclusionary nature, including excessive pricing, discriminatory treatment, predatory pricing, and tied and conditional trading.

24. The Act also provides for the determination, by the Minister of Trade and Industry, of dominance thresholds in relation to undertakings. In this regard, the rules made under the

Competition Act, 2003, that were gazetted in March 2008 prescribed specific criteria for determining dominant positions in markets. Under these criteria, an undertaking has a dominant position if it has (a) at least 45 per cent of that market; (b) at least 35 per cent, but less than 45 per cent, of that market, unless it can show that it does not have market power; or (c) less than 35 per cent of that market, but has market power.

25. In terms of section 27, any undertaking or association of undertakings may apply to the NaCC to be exempted from the provisions of part I (restrictive agreements, practices and decisions) and part II (abuse of a dominant position) of chapter 3 of the Act in respect of any agreement or category of agreements, any decision or category of decisions and any concerted practice or category of concerted practices.

26. Exemption from the provisions of part I of chapter 3 can be applied for with regard to all anti-competitive agreements falling under section 23 of the Act, which does not distinguish between horizontal agreements, most of which should be per se prohibited, and vertical agreements, most of which should be considered using a rule of reason approach. This implies that even those horizontal agreements that should be per se prohibited, including hard-core cartel arrangements, can be considered for exemption. International best practice is that per se prohibited restrictive business practices should not be eligible for exemption from the application of competition rules.

27. Exemption from the provisions of part II of chapter 3 can also be applied for in relation to all forms of monopolization under section 24 of the Act, which constitute serious and highly anti-competitive restrictive business practices.

28. The NaCC has powers under section 33 of the Act to investigate restrictive business practices either on its own or upon receipt of a complaint. Any person can submit a competition complaint to the Commission.

29. Section 33(3) provides that if the NaCC decides to conduct an investigation into a restrictive business practice, it must give written notice of the proposed investigation to every undertaking to be investigated, indicating the investigation's subject matter and purpose, and inviting the undertakings concerned to submit any representations they may wish to make to the Commission in connection with any matter to be investigated. The concern is that in cartel investigations, warning the undertakings of investigations may result in the destruction of evidence.

30. The remedial actions under the Act against restrictive business practices are numerous and include cease and desist orders, possible restitution and damages, and imposition of fines. It is however noted that all the remedies are of a behavioural nature, and structural remedies for restrictive business practices are not specifically provided for in the Act.

31. The NaCC may also, under section 39 of the Act, apply to the High Court for an interim order, restraining undertakings from engaging in restrictive business practices pending the conclusion of investigations, if the NaCC believes it necessary for it to act as a matter of urgency for the purpose of preventing serious, irreparable damage to any person or category of persons, or protecting public interest.

32. Furthermore, under section 40, the NaCC may enter into settlement agreements with the concerned undertakings, during or after an investigation into an alleged restrictive business practice, by means of application to the High Court for confirmation as an order of the Court. The settlement agreement between the Commission and the concerned undertaking, which should be with the consent of the complainant, may include an award of damages to the complainant and any amount proposed to be imposed as a pecuniary penalty.

D. Mergers

33. The merger control provisions in chapter 4 the Act are extensive and cover pertinent issues such as change of control, pre-merger notification and merger notification thresholds.

34. The definition of the term "merger" under section 42 of the Act shows the change of control that must occur in the transaction and covers the three common types of mergers, as well as joint ventures. It also covers the acquisition of controlling interests in both shares and assets of other undertakings. From stakeholder consultations held, the need for greater clarity in the definition to avoid misinterpretation and misrepresentations was nevertheless recognized.

35. Section 43(3) prohibits any person from implementing a proposed merger, unless it has been approved by the NaCC, and is implemented in accordance with any conditions attached to the approval. This requires pre-merger notification, which is in line with international best practice.

36. Section 43(2) provides for the determination of merger notification thresholds by the Minister of Trade and Industry. The Minister, as per Government Notice No. 307 (determination of class mergers to be excluded from chapter 4 of Competition Act, 2003), accordingly determined the merger notification thresholds, which set a value equal to or below (a) N$20 million of the combined assets, or annual turnover, in Namibia of the merging parties; (b) N$20 million of the annual turnover in Namibia of the acquiring undertaking plus the assets in Namibia of the target undertaking; (c) N$10 million of the annual turnover, or assets, in Namibia of the target undertaking.

37. In line with international best practice, the determined merger notification thresholds are based on "size-of-the-transaction" factors of assets and/or annual turnovers and also provide an appropriate local nexus of jurisdiction as recommended by both the Organization for Economic Cooperation and Development and the International Competition Network. Stakeholders consulted, including the NaCC, were however of the opinion that the gazetted merger notification thresholds are low and do not serve their intended purpose of screening out small mergers with few competition concerns from intensive merger examination.

38. The period for making determinations in relation to proposed mergers is provided for under section 45 of the Act. In this regard, the NaCC must consider and make a determination in relation to a proposed merger of which it has received notification within 30 days after notification or, if the Commission requests further information, within 30 days after the date of receipt of the information. If NaCC decides to convene a conference on the proposed merger, the determination must be made within 30 days after the date of conclusion of the conference. The NaCC may also extend the above merger examination periods due to the complexity of the issues involved, but the extension should be by notice in writing to the merging parties and should not exceed 60 days.

39. In making a determination in relation to a proposed merger, the NaCC may give approval for the implementation of the merger, with or without conditions, or may decline to give approval for the implementation of the merger. The NaCC may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances, including public interest issues.

40. Section 49 provides for the review, by the Minister of Trade and Industry, of NaCC merger decisions. In this regard, a party to a merger may make an application to the Minister to review the Commission's decision on the merger no later than 30 days after notice is given by the NaCC of its determination. The Minister may overturn the decision of the Commission, amend the decision by ordering restrictions or including conditions, or confirm the decision.

41. Stakeholder concerns were expressed that the Act does not specify criteria that can be used by the Minister in reviewing NaCC decisions on mergers, as it does in the determination of mergers by the Commission.

E. Jurisdiction of court

42. Under section 52, the High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted under the Act. The High Court is empowered to impose pecuniary penalties for contravention of the provisions of the Act. Fines imposed under the Act must be paid into the State Revenue Fund, and orders imposing the pecuniary penalties have the effect of, and may be executed as they were, civil judgements granted by the High Court in favour of the Government of Namibia.

F. General provisions

43. The general provisions of the Act provide for (a) civil actions and jurisdictions; (b) prohibitions on disclosure of information; (c) disclosure of private interest by staff; (d) time within which investigation may be initiated; (e) limitation of liability; and (f) standard of proof.

G. Offences and penalties

44. Section 60 provides that a person commits an offence if that person hinders, opposes, obstructs or unduly influences any person who is exercising a power or performing a duty conferred or imposed on that person by the Act. It is also an offence under the Act to fail to comply with a summons issued by NaCC to attend before the Commission or, being in attendance, to refuse to take an oath or affirmation, to refuse to answer any question to which NaCC requires an answer or give false evidence or to fail to produce evidence that is required by NaCC, as well as to fail to comply with orders of the High Court given under the terms of the Act.

45. Other offences under section 63 of the Act include improperly influencing the NaCC concerning any matter connected with the exercise of any power or the performance of any function of the Commission, anticipating any decisions of the NaCC concerning an investigation in a way that is calculated to influence the proceedings of decision, doing anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law and knowingly providing false information to the Commission.

46. Penalties for committing the offences are provided for under section 64 of the Act, and are in the form of monetary penalties and/or imprisonment. Monetary penalties range from N$20,000 to N$500,000, and imprisonment ranges from periods not exceeding one year to not exceeding 10 years.

H. Application of the Act and other legislation relating to competition

47. Chapter 8 of the Act deals with the important issue of the relationship between the NaCC and those sector regulators in Namibia that have jurisdiction over competition matters related to restrictive business practices and mergers in their sectors. Provision is made that the Commission and the sector regulators that have competition functions must negotiate and conclude concurrent jurisdiction agreements to coordinate and harmonize the

exercise of jurisdiction over competition matters within the regulated sectors and to secure the consistent application of the Competition Act.

III. Other relevant laws

A. Sector regulation

48. Namibia has a number of sector regulators in key sectors, such as the financial services sector (the Bank of Namibia (BoN) and the Namibia Financial Institutions Supervisory Authority (NAMFISA)), the communications services sector (the Communications Regulatory Authority of Namibia (CRAN)), the regulation of ports (the Namibian Port Authority (NAMPORT)) and the distribution of electricity (the Electricity Control Board (ECB)), with some having competition functions in their respective sectors.

49. BoN, CRAN and ECB have clear overlaps with NaCC on competition in the regulated sectors. While the enabling Acts of NAMFISA and NAMPORT do not give the sector regulators specific competition mandates, NaCC correctly noted that situations can arise which create overlaps between the functions of agencies and those of NaCC that make it difficult for them to carry out their respective mandates.

50. As at the time of the fact-finding visit, the NaCC had negotiated and concluded cooperation agreements with four sector regulators (CRAN, BoN, ECB and NAMPORT). It had also concluded an agreement with the Anti-Corruption Commission on bid-rigging and collusive tendering. The agreements with CRAN, BoN and ECB are in the form of memorandums of agreement on concurrent jurisdiction over competition in the regulated sectors, while that with NAMPORT is in the form of a memorandum of understanding.

51. The cooperation agreement between NaCC and CRAN was reportedly working very well, even though its provisions on confidentiality and use of information prevent the exchange of pertinent information on the business transactions under scrutiny. The agreement with BoN was said to be dormant, while that with the ECB was still in its infancy. The agreement with NAMPORT had not been effective because of the dual role of that organization of being both regulator and market player.

B. Consumer protection

52. While Namibia has an enforceable competition law and is in the process of formulating a comprehensive competition policy, it still does not have such a law and policy related to consumer protection. A consultant was assigned by the Ministry of Trade and Industry the task of looking at the formulation of a consumer protection policy first and then the law, but the process was said to be taking too long. The Law Reform and Development Commission had therefore taken it upon itself to spearhead the drafting of the law.

53. The Law Reform and Development Commission, in its discussion paper on the consumer protection project, noted that economic efficiency has traditionally been the key aim of competition policy and law, and that the effective enforcement of competition law contributes to the efficient and equitable functioning of a progressive market economy that in the long-term results in producer benefit and consumer welfare. The relevance of competition policy to consumer protection regulation therefore is linked to the optimization of consumer welfare through the application of competition policy.

54. It was therefore correctly inferred in the Law Reform and Development Commission's discussion paper that competition law in Namibia provides for consumer

protection through action against collusion, price fixing, abuse of a dominant position or restrictive business practices, and that this denotes positive outcomes for consumers. It was however cautioned that it would be wrong to treat competition policy and law as a panacea that would automatically serve consumer interests.

C. Intellectual property

55. The Competition Act, 2003, of Namibia recognizes intellectual property rights in its exemption of certain restrictive practices. Section 30 of the Act provides that the NaCC may, upon application, and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights.

56. Namibia has an Industrial Property Act, 2012, which has the object "to provide for the establishment of an Industrial Property Office and the appointment of a Registrar of industrial property; to provide for the grant, protection and administration of patents and utility model certificates; to provide for the registration, protection and administration of industrial designs; to provide for the registration, protection and administration of trademarks, collective marks, certification marks and trade names; to provide for the registration of industrial property agents; to provide for the establishment of an Industrial Property Tribunal; and to provide for incidental matters".

57. A Business and Intellectual Property Authority Act is in the process of being enacted by Parliament. The relevant bill under consideration aims at establishing the Business and Intellectual Property Authority. The NaCC intends to conclude a cooperation agreement with the Business and Intellectual Property Authority when the Authority becomes fully operational.

58. At the Subregional Workshop on Intellectual Property and Competition Policy for Certain African Countries, held in Harare, Zimbabwe, in November 2013 under the auspices of ARIPO and WIPO, recommendations were made on various aspects concerning the interface between the protection of intellectual property and the enforcement of competition and/or consumer protection rules, which are pertinent to the situation in Namibia.

IV. Institutional Framework

59. The Competition Act, 2003, provides for a number of institutions in the enforcement of the country's competition law. These are (a) the NaCC; (b) the Minister of Trade and Industry; and (c) the High Court of Namibia.

A. Namibian Competition Commission

60. The NaCC has many powers and duties under the Act, including powers to make rules, to make determinations on applications for exemptions of certain restrictive practices, to make decisions on the infringement of part I prohibitions on restrictive agreements, practices and decisions and part II prohibitions on abuse of a dominant position, to institute proceedings in the High Court against undertakings for remedial orders, to make application to the High Court for interim orders restraining undertakings from engaging in potentially damaging conduct pending conclusion of the matter, to enter into agreements of settlement (consent agreements) with concerned undertakings setting out the terms to be

submitted to the High Court for confirmation as orders of the Court and to make determinations on proposed mergers and acquisitions.

61. Being a non-commercial statutory body, the NaCC is largely dependent on the Government for the funding of its operations. Section 17(1) of the Competition Act, 2003, provides that the NaCC funds consist of money appropriated by Parliament for the purposes of the Commission, fees payable to NaCC under the terms of the Act, money vesting in or accruing to NaCC from any other source and interest derived from the investment of funds of the Commission.

62. During the NaCC 2012/13 financial year, which ended on 31 March 2013, its sources of funding were (a) government grants (77 per cent); (b) filing fees (mergers) (18 per cent); (c) investment interest (4 per cent); and other income (exemption fees, profit on sale of vehicle, sundry income, etc.) (1 per cent). The trend continued into the 2013/14 financial year, during which NaCC revenue in the first six months ended on 30 September 2013, totalling N$15,832,728, and consisted of (a) government grants, N$12,000,000 (75.8 per cent); (b) rendering of services, N$3,230,190 (20.4 per cent); (c) penalties received, N$100,000 (0.6 per cent); and (d) investment revenue, N$502,538 (3.2 per cent).

63. While the NaCC is currently in a sound financial position from its present sources of funding, experiences of other competition authorities in the region show that heavy dependency and reliance on government funding inhibits operational expansion.

64. The NaCC has two operational arms: (a) a Board of Commissioners of part-time members; and (b) a secretariat of full-time professionals. The Board of Commissioners consists of a chairperson and not less than two or more than four members, who are all appointed by the Minister. Members of the Board must have expertise in industry, commerce, economics, law, accountancy, public administration or consumer affairs and hold office for terms of three years. The current Board has a full membership of five Commissioners, who all possess the requisite qualifications and experiences.

65. The secretariat of NaCC is headed by the Secretary to the Commission, who is appointed under the terms of section 13(1) of the Act as the NaCC Chief Executive Officer responsible for the formation and development of an efficient administration and for the organization, control, management and discipline of the staff of the Commission. Other members of the secretariat include inspectors who are recruited for the purposes of investigating restrictive business practices and mergers and acquisitions.

66. The NaCC is basically a quasi-judicial body with investigative and limited adjudicative functions. The Act however does not clearly apportion NaCC's investigative and adjudicative functions between its secretariat and Board of Commissioners. It does not lucidly define when and what sort of actions should be taken by the secretariat and by the Board of Commissioners in the handling of competition cases due to the term "Commission" referring to both the Board and the secretariat.

67. It is however inferred in the Act that the secretariat is the NaCC investigative arm. Section 14(1) of the Act provides for the designation of any of the Commission's employees as inspectors for the purposes of investigating restrictive business practices and examining mergers and acquisitions. It has also become established practice in NaCC that the secretariat investigates competition cases and submits reports on the findings to the Board of Commissioners for determination.

B. Minister of Trade and Industry

68. The Minister of Trade and Industry reviews decisions of the NaCC on mergers and acquisitions. The review can however only be undertaken upon application by a party to the merger, which should be made within 30 days following the gazetting of an NaCC decision.

C. High Court of Namibia

69. Under the terms of section 52 of the Act, the High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of the Act. The Court has the sole responsibility under the terms of section 53 of the Act of imposing pecuniary penalties for breach of the provisions of the Act.

V. Staffing and human resources

70. As at the time of the fact-finding visit, the NaCC had a staff complement of 28 employees, of which 23 were professional staff, 4 administrative support staff and 1 unskilled labourer. The staff however consisted of a total of 40 positions, and plans are to grow the establishment to 45 positions during the next five years. Staff turnover in the Commission is very low, with only three terminations of service since its inception in 2009.

71. NaCC employees are organized into four divisions, in addition to the Office of the Chief Executive Officer and Secretary to the Commission: (a) the Corporate Services Division; (b) the Mergers and Acquisitions Division; (c) the Restrictive Business Practices Division; and (iv) the Economics and Sector Research Division. All NaCC professional staff are adequately qualified for their positions and have university degrees in their respective areas of competences (i.e., economics, law, administration and accounts). The mix of economists and lawyers for the effective implementation and enforcement of competition policy and law is also adequate, with 11 economists in position and 7 lawyers.

72. The NaCC has a staff development programme under which it assists employees in advancing their academic and professional qualifications and experiences. The programme not only involves sponsorship in university courses on competition law and policy, but also on-the-job training for competition case investigation and analysis, attendance and participation at various international competition events and regional training workshops on competition and consumer policy and law. Tailor-made training on competition law and practice for professional staff is also arranged.

VI. Competition law enforcement

73. At the time of the fact-finding visit, the NaCC had handled over 291 competition cases and market investigations since its effective coming into operation in 2009. Of these competition cases, 234 were mergers and acquisitions, 54 involved restrictive business practices, including exemptions, and 3 were market investigations.

Case category	*2009*	*2010*	*2011*	*2012*	*2013**	*Total*
Mergers and acquisitions	11	26	62	94	41	234
Restrictive business practices	4	14	15	11	10	54
Market investigations	0	0	0	0	3	3
Totals	15	40	77	105	54	291

* To October.

A. Mergers and acquisitions

74. Of the 234 cases of mergers and acquisitions that were received and handled by NaCC since 2009, 206 cases were approved unconditionally (constituting 88.03 per cent of total cases), 20 cases (8.55 per cent) were approved with conditions, 3 cases were prohibited (1.28 per cent), 1 case was not challenged (0.43 per cent), and 4 cases were withdrawn by the merging parties (1.71 per cent).

75. Two landmark mergers that were examined by NaCC, and illustrated NaCC's application of the merger control provisions of the Act, were the Seesa Namibia/RTZ Zelpy and Others merger and the Wal-Mart/Massmart merger. The Seesa Namibia/RTZ Zelpy and Others merger was not only the first notifiable merger under the Act to be examined and determined by the Commisson, it was also the first such transaction to be determined following the holding of a stakeholder conference under the terms of section 46 of the Act. It also led to the conclusion of NaCC's first competition compliance programme and agreement with a business undertaking. The Wal-Mart/Massmart merger showed NaCC's application of the public interest provisions of the Act in its examination and determination of mergers. It also fully taxed the Commission's reaction abilities and capabilities since its decision was challenged by one of the world's most powerful corporations.

76. Many of the stakeholders consulted indicated their satisfaction with NaCC's handling of mergers and acquisitions, which was felt to be facilitative of business in terms of fees paid, examination time and level of consultation. The determinations on mergers by NaCC were also mostly accepted.

B. Restrictive business practices

77. Of the 54 cases involving restrictive business practices that have been received and handled by NaCC since 2009, 16 were requests for advisory opinions, mostly on the application of the provisions of the Act, which were given. Only one such case turned into a competition investigation. The rest of the cases were complaints received (31 cases), investigations initiated (5 cases) and exemption applications (2 cases).

78. A number of the cases handled (totalling 13) were closed for various reasons, including lack of jurisdiction and withdrawal by the complainants. Most of the cases (24) were still being investigated by the time of the fact-finding visit. NaCC had however not found a contravention of the provisions of the Act on anti-competitive agreements or abuse of dominance.

79. Stakeholder concerns were expressed over the length of time it was taking NaCC to complete investigations on restrictive business practices and take the necessary remedial action. One case involving an exemption application was still outstanding more than four years after submission of the application. The time spent on the investigation of other cases of restrictive business practices that were still active by the time of the fact-finding visit ranged from three months to more than three years and six months.

80. Stakeholders were also concerned that NaCC had still not found a contravention from its investigations into restrictive business practices, given the prevalence of such practices in Namibia, particularly concerning price-fixing arrangements.

C. Enforcement challenges

81. While most of the stakeholders consulted were generally satisfied with NaCC's enforcement of the Act's merger control provisions, many showed dissatisfaction with its

enforcement of the restrictive business practices provisions. Sentiments were also expressed that the Commission seems to be concentrating more on mergers and acquisitions than on restrictive business practices.

82. Capacity-building in the NaCC Restrictive Business Practices Division could improve the Commission's enforcement of the restrictive business practices provisions of the Act by increasing the Division's confidence in making well-analysed competition recommendations that withstand legal challenges.

83. The NaCC Economics and Sector Research Division, which commenced operations in late 2012 as a technical and policy unit, has also become an important competition operational division, with its own core functions of market enquiries and price monitoring. The market enquiries activities of the Division can be used to identify competition concerns in various sectors and industries for follow-up by the NaCC Restrictive Business Practices Division and/or the Mergers and Acquisitions Division.

84. The price monitoring and surveillance activities of NaCC are at the request of the Ministry of Trade and Industry and are not specifically provided for in the Act. The Ministry advised that in requesting NaCC to get involved in price monitoring activities, the intention is not to turn NaCC into a price control agency but merely to get NaCC's opinion on the matter to assist the Ministry in its decision-making processes, particularly on products that are being subsidized by the State.

VII. Other relevant issues

85. The other relevant issues that were reviewed were (a) advocacy and awareness of NaCC's operations and activities; (b) competition courses at Namibian universities and other institutions of higher learning; (c) the annual report; and (d) NaCC's office accommodation.

A. Advocacy and awareness

86. The visibility of NaCC is fairly good, with most of the business undertakings in both the private and public sectors of the economy aware of the existence of the Commission. NaCC is aiming to reach out to schools and colleges to bring awareness of its operations to the students who will grow up to be businesspersons. NaCC is also engaging with the University of Namibia through giving lectures on competition policy and law.

87. NaCC in 2012 started publishing and distributing its newsletter, the *NaCC Competition News*, as a quarterly publication. The newsletter is targeted at the business community and the Commission's other stakeholders in both the private and public sectors of the economy. The recipients of the newsletter also include schools, the national library and other competition authorities. NaCC is also venturing into publicizing itself through radio, to complement what it is already doing on television, since radio programmes are particularly aimed at rural areas.

B. Competition courses at universities

88. Namibia has a number of institutions of higher learning, comprising universities and polytechnics. However, none of the institutions currently offers full-time courses on competition policy and law. The Polytechnic of Namibia and the University of Namibia expressed interest in introducing competition policy and law courses, subject to securing the relevant funding.

C. Annual report

89. At the time of the fact-finding visit, NaCC had not submitted to the Minister of Trade and Industry, in accordance with the provisions of section 21 of the Act, any consolidated annual reports since the commencement of its operations in 2009 because of operational constraints. The annual financial statements were however ready and up to date, having been audited by the Office of the Auditor-General. It was only the activity part of the annual report that was outstanding, and the process of its finalization was under way.

D. Office accommodation

90. NaCC has offices in a modern office and shop complex building situated in the Windhoek central business district along the main Independence Avenue. The offices are on the building's mezzanine floor and easily accessible. While the office space is adequate for NaCC's operations, it will not accommodate the envisaged growth in the staff establishment to 45 employees.

91. NaCC's library is small and mainly contains publications on competition policy and law produced by organizations such as UNCTAD, the Organization for Economic Cooperation and Development, the International Competition Network and the European Commission. Very few academic books on the relevant subjects of economics and law were seen in the library for reference purposes. While the Internet is increasingly being used for accessing research material, a well-stocked reference library is still required.

VIII. Findings and recommendations

92. Namibia has a fairly good competition law as enshrined in the Competition Act, 2003. The law not only covers the three major competition concerns of anti-competitive agreements, abuse of dominance, and anti-competitive mergers, it also takes into account the special requirements of the country's economy, which are the protection and promotion of small undertakings, particularly those owned or controlled by persons who have been subject to past discriminatory laws or practices and thereby disadvantaged socially, economically or educationally.

93. Recommendations on those issues that need to be addressed or improved are however summarized below:

I. Recommendations concerning the Competition Act, 2003

#	*Recommendation*	*To whom directed*
1	The term "relevant market" should be defined under section 1 of the Act to give a clear guideline on the identification of markets under competition investigations.	NaCC/MTI*/ Legislature
2	The common competition terms that are not defined in the Act, such as "dominant position", "essential facility", "negative clearance", and "statutory monopoly", should be defined under section 1 of the Act in line with international best practices.	NaCC/ MTI/ Legislature
3	Section 3(3) of the Act should be amended to remove the exemption from the application of the Act of those activities of statutory bodies that are authorized by any law. Alternatively, the whole of section 3(3) of the Act could be deleted since statutory bodies can be covered under section 3(2) which deals with the applicability of the	NaCC/ MTI/ Legislature

#	*Recommendation*	*To whom directed*
	Act to the State.	
4	The exercise of the Minister's exemption powers under section 3(1)(c) of the Act should be subject to clear statutory guidelines aimed at meeting public interest objectives of a socioeconomic nature as provided for in the Constitution of Namibia.	MTI
5	There should be a clear distinction in the Act between horizontal and vertical agreements that are anti-competitive, and their treatment as either per se prohibited offences or those considered using a rule of reason approach. The terms "horizontal agreement" and "vertical agreement" should also be defined in the relevant part of the Act to which the terms apply, i.e. part I of chapter 3 on restrictive agreements, practices and decisions.	NaCC/ MTI/ Legislature
6	The term "excessive pricing" should be defined in chapter 3 of the Act on restrictive business practices, and the price regulation remedy of excessive pricing should be clearly linked to the elimination of the responsible restrictive business practice.	NaCC/ MTI/ Legislature
7	Those restrictive business practices that seriously affect competition, such as anti-competitive horizontal agreements of a hard-core cartel nature and abuse of a dominant position, should not be eligible for exemption from the provisions of part I and part II of chapter 3 of the Act.	NaCC/ MTI/ Legislature
8	A clearer definition of the term "merger" should be found to meet the concerns of stakeholders. In that regard, consideration could be given to adopting the definition in the UNCTAD Model Law on Competition, which is that "'mergers and acquisitions' refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates".	NaCC/ MTI/ Legislature
	II. Recommendations concerning merger control	
9	The merger notification thresholds that were gazetted in December 2012 should be reviewed upwards to ensure that they serve their intended purpose of screening those transactions that do not cause serious competition concerns.	NaCC/ MTI
10	The provisions of section 47(2) of the Act, which outlines specific factors that have to be taken into account by NaCC in determining mergers, should be extended to section 49 of the Act that gives the Minister powers to review NaCC decisions on mergers.	MTI
	III. Recommendations concerning control and prevention of restrictive business practices	
11	The Act, or the Rules made under the Act, should have provisions on the maximum periods that NaCC should spend in investigating restrictive business practices and considering applications for exemption, as is the case with the examination of mergers and acquisitions.	NaCC/ MTI/ Legislature

#	*Recommendation*	*To whom directed*
12	The investigative and analytical capacity of staff members of the Commission's Restrictive Business Practices Division should be further developed to speed up the handling of competition cases and build confidence in the Division in making recommendations on restrictive business practices that withstand challenges.	NaCC
13	NaCC should give equal concentration to restrictive business practices and mergers and acquisitions, which are its core operations, in the form of policy, strategic and operational direction.	NaCC
14	NaCC's draft corporate leniency rules should be approved by the relevant government authorities as a matter of urgency, and corporate leniency programmes should be provided for in the Competition Act, 2003, as a statutory requirement.	Attorney General's Office/NaCC/ MTI/ Legislature
IV.	**Recommendations concerning markets investigations and industry surveillance**	
15	NaCC's "unofficial" function of price monitoring and surveillance should be formalized in the Competition Act, 2003, with clear guidelines on its carrying out to avoid conflicts with the basic independent operation principle of competition.	NaCC/MTI/ Legislature
V.	**Recommendations concerning relations with sector regulators**	
16	The exchange of confidential information between NaCC and those sector regulators that have competition functions should be provided for in the relevant enabling Acts.	NaCC/Sector regulators/ Legislature
VI.	**Recommendations concerning institutional issues**	
17	In appointing members to the Board of Commissioners, the Minister should ensure that not more than one member is retired at the same time for effective decision-making continuity.	MTI
18	The separation of NaCC's investigative and adjudicative functions should be clearly provided for in the Act, with the secretariat being formally given statutory investigative functions and the Board of Commissioners retaining the adjudicative functions, with well-defined responsibilities and spheres of operation.	NaCC/ MTI/ Legislature
19	NaCC should identify alternative sources of funding for its operations, subject to the provisions of section 17(1) of the Act.	NaCC
20	NaCC should adequately resource all its divisions in terms of human resources by filling the vacant posts and recruiting more staff in the Corporate Communications Section of the Corporate Services Division, the Mergers and Acquisitions Division and the Economics and Sector Research Division, as well as recruiting more economists at senior levels in the Restrictive Business Practices Division.	NaCC

#	*Recommendation*	*To whom directed*
21	NaCC should continue with, and further develop, its staff training programme to include study tours of more developed competition authorities and staff exchanges with other authorities in the region.	NaCC
22	NaCC should expedite the drafting of its inaugural annual report, covering all the years of its operations, and ensure that future reports are drafted and submitted to the Minister of Trade and Industry within the time scales stipulated in section 21 of the Act.	NaCC
	VII. Recommendations concerning consumer protection	
23	The process towards the formulation and enactment of a consumer protection policy and law in Namibia should be sped up, with serious consideration being given to having NaCC being the primary implementer and enforcer of that policy and law.	MTI
	VIII. Recommendations concerning the interface between competition and intellectual property laws	
24	NaCC should involve itself in international events on the important interface between the protection of intellectual property and the enforcement of competition and/or consumer protection law, and should seriously consider implementing the recommendations made at the ARIPO/WIPO subregional workshop on intellectual property and competition policy that was held in Harare, Zimbabwe, in November 2013.	NaCC
	IX. Recommendations concerning other relevant issues	
25	Funding should be found for the introduction of full-time courses on competition policy and law at either or both the University of Namibia and Polytechnic of Namibia	Cooperating partners
26	NaCC should be given financial assistance in the stocking of its library with relevant reference books on subjects dealing with competition policy and law.	Cooperating partners
27	NaCC should be given technical and financial assistance in the following identified areas, some of which require expert studies: (a) revision of the Competition Act and the rules; (b) consumer protection policy and law, and NaCC's role in the implementation of that policy and enforcement of the law; (c) the roles of the NaCC's Board and Commissioners and secretariat, and (d) capacity-building and staff training and development, particularly in enforcement.	Cooperating partners

* MTI, Ministry of Trade and Industry.